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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-203

MORTON EISEN, and so forth,

Petitioners,

vs.

CARLISLE & JACQUELIN, *et al.*

Motion for Leave to File Brief Amicus Curiae in Support of Petitioners and Brief of Amicus Curiae.

CALIFORNIA TRIAL LAWYERS ASSOCIATION,
By STEPHEN I. ZETTERBERG,
for ROBERT E. CARTWRIGHT,
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Motion for Leave to File Brief Amicus Curiae in Support of Petitioners.

California Trial Lawyers Association hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorneys for all three Respondents was requested but refused.

California Trial Lawyers Association is an association of approximately 5,000 lawyers who are members of the California Bar, and whose practice particularly relates to the courts at trial and appellate levels. The association conducts seminars and courses of study open to lawyers, and has conducted such seminars in class action matters. Many of its members have experience in class action litigation. It has a Class Action Committee, which works which the courts and members of the Bar in California relative to class action matters. Its interest in the case rises as a public service to the California court system, because of the importance of this case to future class action litigation in California and in other states.

In the instant case, the Court of Appeals declined to give weight to California cases and experience in class action litigation on grounds that the California class action statute is different from Rule 23, Federal Rules of Civil Procedure. In fact, California courts give great weight to Rule 23, and the California experience in class actions is believed to be highly relevant to the issues the United States Supreme Court will consider. Since many of the California cases on class action are recent, and California has taken measures simplifying trial court management of class actions, it is believed that the brief which *amicus curiae* is requesting permission to file will contain argument on the California experience which would be helpful to this Court and to the parties, and which otherwise might not be made. If this argument is accepted, it can dispose of many issues raised by the Court of Appeals below.

Respectfully submitted,

CALIFORNIA TRIAL LAWYERS ASSOCIATION,

By STEPHEN I. ZETTERBERG,
for ROBERT E. CARTWRIGHT,
WILLIAM H. LALLY,
EDWARD I. POLLOCK,
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Amicus Curiae Brief in Support of Petitioners.

Contrary to Judge Medina, California Class Action Law Is Closely Interrelated to Rule 23, Federal Rules of Civil Procedure.

The ultimate decision in this case will have an important influence on consumer litigation, particularly consumer class actions, in state jurisdictions. This effect is multiplied by the fact that state courts are following the model of Federal Rule 23, and the decisions thereunder. *Amicus* believes that California in particular will suffer if the *Eisen* decision below is allowed to stand.[1]

Under the case of *Snyder v. Harris,* 394 U.S. 332, Reh. den'd 394 U.S. 1025 (1969), federal class actions based upon diversity are limited to classes in which the claim of each plaintiff class member is at least $10,000.00. Thus, most consumer class actions will

[1]*Eisen v. Carlisle & Jacquelin,* 479 F.2d 1005 (1973).

fall within state court jurisdiction. The California courts have entertained class litigation, including consumer litigation, under the authority of California Code of Civil Procedure 382, and other sections.[2] There are no state-wide rules of court paralleling Federal Rule 23.

Judge Medina's opinion, at 1012, incorrectly represents that *Daar v. Yellow Cab Company*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 443 P.2d 732 (1967) implies that all California class actions are outside the framework of Rule 23 precedent. Judge Tyler in the trial court below used *Daar v. Yellow Cab Company, supra,* as precedent for orders at trial level. Judge Medina in reversing Judge Tyler distinguished *Daar* as (1) being under a "state class action statute very different in the phraseology from amended Rule 23," and (2) being a "ruling made on demurrer."[3]

On Judge Medina's second *Daar* point, he is technically right but wrong in substance. *Daar* was decided on demurrer, but on demurrer to class action issues. The lower court did not dismiss the named plaintiff's causes of action; it sent it to the Municipal Court thus preserving individual causes as did Judge Medina in *Eisen,* below. It dismissed the class action. Technically, such dismissal of class issues was not appealable, but the Supreme Court of California granted the appeal and reversed, holding that the class dismissal was in effect a dismissal of the action.

On his first *Daar* point, Judge Medina's analysis is quite wrong. California Code of Civil Procedure Sec-

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[2]See, *e.g.*, 2 CAR 69 (Class Action Reports, Washington, D.C., Vol. 2, No. 3, 3rd Qtr. 1973) assigning a leadership role in class actions to California courts.

[3]479 F.2d 1005, at 1012.

tion 382 is indeed different in language from Federal Rule 23; but under California law and procedure Federal Rule 23 is used as persuasive precedent in California class action litigation. In the leading case of *Vasquez v. Superior Court*, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964 (1971) at 821, the Court said: "In the event of a hiatus [in California law], Rule 23 of the Federal Rules of Civil Procedure prescribes procedural devices which a trial court may find useful" (Citing *Daar, supra*).

California Law Fits Trial Procedure Under Federal Rule 23 Better Than Judge Medina's Decision Below.

Federal Rule 23 gives wide latitude to the trial court, 23(c) and (d), in determining the maintainability of class action, and in making orders for the conduct of class actions. In *Eisen*, the Court of Appeals sees complexities and inpracticalities where the trial court itself has been simplifying the issues and performing the practical. It is Judge Medina, not the trial judge, who takes umbrage at the large number in plaintiffs' class. The trial court is willing to "maintain" the action under Rule 23(c); it is the Appellate Court which does not want to face the problems. Where the trial judge has made orders, under Federal Rule 23(d), determining the course of proceedings, making provision for fair notice, and dealing with similar procedural matters, exactly as anticipated by Federal Rule 23(d), Judge Medina on appeal has found the practical progress made by the trial court, including the use of "fluid recovery," to be impractical. It is Judge Medina who resists the idea of a court bothering with small individual recoveries (*cf.* "$1.30", at 49 F.2d at 101), while

the trial court is willing to focus on the contentions of both sides as to the whole issues involved, whether any one plaintiff's interest is large or small. Likewise, where Judge Medina rejects "mini-hearings" at the trial level, he gives plaintiff class "mini-hearing" treatment of dismissal at the appellate level. The work of the trial court below in processing this particular case, under Rule 23, has been grossly overlooked and undervalued by the Court of Appeals in its opinion below.

In *Daar, supra,* as in *Vasquez, supra,* the California Supreme Court expressly cites, approves, and follows Federal Rule of Civil Procedure 23.[4] The court in *Daar* did not dismiss the complaint when problems of common relief arose. Said the court (67 Cal.2d at 709):

> "As a practical matter, a requirement of common relief has no compelling importance and its absence presents no insuperable difficulties. . . . ,"

putting such issues over to a time "after the common issues have been resolved . . . ." Nor did the smallness of individual recovery bother the court, which said (*ibid.,* p. 715):

> ". . . absent a class suit, recovery by any of the individual taxicab users is unlikely . . . . separate actions would be economically unfeasible. . . . Joinder of plaintiffs would be virtually impossible. . . . absent a class suit, defendant will retain the benefits of its alleged wrongs."

Daar was sent back to the trial court, and eventually settled favorably to plaintiff class. The *Daar* case cites may other California cases showing class actions to be workable.

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[4]67 Cal.2d at 708, 709.

Following *Daar*, in *Collins v. Rocha*, 7 Cal.3d 232, 102 Cal.Rptr. 1, ... P.2d .... (1972), the California Supreme Court conceded that individual proof of damages for each class member in a relatively small class might become necessary, but nevertheless ruled that a class action was appropriate and that the trial court erred in sustaining a demurrer for lack of classness.

In *Anthony and Lockerbie v. General Motors Corporation*, 33 Cal.App.3d 699, ... Cal.Rptr. ...., ... P.2d .... (1973), a complex products liability case involved 200,000 G.M. trucks, the court trial granted a defense motion that the case not be maintained as a class action. The Court of Appeal reversed. Referring to Federal Rule 23 as a model (at p. 703), it sent the case back for trial. Defendant G.M. did not appeal to the California Supreme Court.

The definitive authority on class actions in California is *Vasquez v. Superior Court*, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964 (1971). Speaking for a unanimous court, Justice Mosk gave careful, practical, and scholarly current review of class action litigation. Justice Mosk did extensive analysis of cases and authorities. It is respectfully submitted that this decision is more in the conceptual, intellectual, and legal inheritance of Federal Rule 23 than is the opinion of Judge Medina in *Eisen*, below. Says Justice Mosk, at 807 (quoting 8 U. of Chi. L.Rev. 684, 686):

> "Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone, if and when he can,

there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much of the contemporary law . . . ."

Where Judge Medina takes trial court orders as "mini-hearings," and rejects them under Rule 23, Justice Mosk, in *Vasquez* (*supra*, at p. 820) states:

> "If the class action is to prove a useful tool to the litigants and the Court, pragmatic procedural devices will be required to simplify the potentially complex litigation while at the same time protecting the rights of all the parties . . . ."

Judge Medina overlooks class action benefits to the courts, defendants, and the public. He states (479 F.2d at 1018):

> "Class actions have sprouted and multiplied like the leaves of the greenbay tree. . . .
> "So far as we are aware not a single one of these class actions . . . has ever been brought to trial and decided on the merits."

He conceives that only plaintiffs benefit from class actions.

A judgment in a class action, whether for or against the plaintiffs, is binding on all members of the plaintiff class.[5] Defendants have the benefit of *res judicata*. Even during the trial the defendant is protected from a multiplicity of suits by the on-going class action. In the case of *Bizer v. General Motors Corporation*, No.

[5]Moore's Federal Practice, 2d Edition, 1969, Vol. 3B, pp. 23-32.

C226435 pending in the Superior Court of the State of Arizona in and for the County of Maricopa, defendant General Motors Corporation obtained a stay of Arizona proceedings based upon a previously filed California class action, *Anthony and Lockerbie v. General Motors Corporation*, No. 959058 in the Superior Court of the State of California for the County of Los Angeles.

Judge Medina nowhere refers to the failure of justice when a class action is dismissed. The California court in *Vasquez v. Superior Court, supra*, reviews the needs of consumers to have access to class actions, not in spite of, but because of, the smallness of their interest. Says the Court (*ibid.*, p. 808):

> "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society. . . . Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial."

The court below, Judge Medina speaking, gives no credence to these considerations. It is respectfully sub-

mitted that the California experience and view, as described by Mr. Justice Mosk in *Vasquez, supra,* is more in the legal inheritance of Federal Rule 23 than the interpretation of Judge Medina.

Class Actions Are Working in California: Examples of How California Courts Are Working With Class Actions.

On April 3, 1973, the Superior Court of the State of California for the County of Los Angeles, consisting of over one hundred different departments, created a special department for class actions, and enunciated as rules of court, a "Manual of the Conduct of Pre-Trial Hearings on Class Action Issues." This manual was prepared by Judge David A. Thomas.[6] It was prepared after public hearings, and a considerable interchange between several judges, and attorneys representing both plaintiffs and defendants in class actions. Amicus attached the Table of Contents and the Foreword by Judge Thomas to the twenty-six page manual as Appendix A, to demonstrate the scope of these rules.

In his foreword, Judge Thomas mentions that certain procedures in the manual have been drawn from Federal Rules of Civil Procedure, Rule 23. The manual was drawn to implement the requirement of *Vasquez* (*supra*) that pragmatic procedural devices be created to simplify the potentially complex class action litigation and protect the rights of all the parties.

This manual of rules represents considerable combined ingenuity from trial judges and trial attorneys. Many of the problems that seem insuperable to Judge

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[6]Before judicial appointment David A. Thomas was defense counsel in *Daar, supra.*

Medina, below, are dealt with by the manual as routine matters for trial court processing.

In terms of manageability, a federal case pending in the Central District of California, demonstrates the viability of class actions. The action is *Harrison E. Hall, et al., Plaintiffs v. Union Oil Company of California, Defendant,* in United States District Court, Central District of California, No. 69-889-ALS and 69-331-ALS. This is a case involving oil spill in Santa Barbara, California, waters. There are common issues of fact and law in the case, and many issues that are not common at all. There are many different subclasses, problems of notice, issues of differing damages, to home owners, commercial operators, fisheries and the like. Judge Albert Lee Stevens, previously a Superior Court Judge in California, has proceeded with management of the case, under Federal Rule 23, with numerous subclasses, mini-trials, and even arbitration hearings. Several kinds of notice were set by the court in manner not unlike the notice procedures used at trial even in *Eisen*. The defendant agreed to pay the cost of notice.

In many ways, the *Hall* case is more complex than *Eisen,* and it is believed the use of class action procedures has saved the courts, litigants, and the public substantial expense.

Another Federal District Court case in California is the case of *Hotel Telephone Charges, Herbert Hafif, et al., Plaintiffs, v. Hilton Hotels Corporation,* MDL Docket No. 89, No. 71,977 MML, involving a suit against a number of defendant hotels and hotel corporations for charging hotel guests a percent of hotel charge to cover the cost of incoming telephone service, whether or not such service is used. The plaintiff class

is approximately forty million patrons. Like *Eisen*, this case is triple-damage antitrust case. The average projected individual recovery was estimated at $2.00. In a twelve-page order dated December 14, 1972, Federal District Judge Lucas held "under Rule 23, Fed. R. Civ. Proc." that the class action was maintainable.[7] Some of the hotel defendants settled by depositing $5,000,000 in the Chicago Federal District Court. Other defendants continued the multi-district-litigation in the Central District of California.

The Los Angeles County manual of class actions, and these cases, are but additional examples of trial courts exercising their special competence in matters thought by Judge Medina, on appeal, to be too complex.

In Class Actions the Due Process Issue Is Fairness of Representation, Not Notice to Class Members.

The concept of notice in Judge Medina's view seems related to the concept of personal jurisdiction over class members, and a requirement of participation of each individual in an action. Out of the procedural failure of these concepts were class actions born. As this Court said in the case of *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 879 (1921), ". . . class suits were known before the adoption of our judicial system and were in use in English Chancery. . . ." One of the reasons the courts originally developed class actions was to avoid the necessity of having every party in court, so that cases could proceed even though the consist of the class changed. *How v. Tenants of Bromsgrove*, 1 Vern. 22 [1681]

[7]Now on appeal to the Ninth Circuit.

(against the lord of the manor for loss of manorial rights of tenants); *Brown v. Vermuden,* 1 Ch. Cas. 272, 282 [1676] and *Cockburn v. Thompson,* 16 Ves. 321, 328 [1809] (cases involving disputes between vicars and parishioners about tithes, and *Sheffield Waterworks Co. v. Yeomans,* L.R. 2 Ch. App. 8 [1866] (suit by waterworks to determine the rights of 1500 persons claiming damages in bursting of water mains). Said Lord MacNaughten in *Duke of Bedford v. Ellis,* L.R.A.C. 1, 8-11 [1901]:

> "Under the old practice the court required the presence of all parties interested in the matter in suit, in order that final end might be made of the controversy. But when the parties were so numerous that you could never 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party . . . a representative suit was in order. . . . '[quoting Lord Eldon, from *Cockburn v. Thompson, supra*] It was better' he added 'to go as far as possible towards justice than to deny it altogether.' . . . Persons suing on behalf of themselves and all others . . . are before the court. . . ."

Under Federal Rule 23(d), the rules provide that:

> "Notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate. . . ."

The trial court here followed this directive; the Court of Appeals disapproved, and dismissed when plaintiff could not pay the cost of individual notice.

The defendant as well as plaintiff benefits from the class action. The decision may be in plaintiff's favor; but if it is, defendant is protected from multiple litigation. Why should plaintiff pay for notice? Rule 23(d) quite properly makes this a question for trial court determination. On what does Judge Medina base the holding that if plaintiff does not pay for notice, the case is dismissed?[8]

The main reason for notice in class actions, it is submitted, is not so that all the parties may have the due process of a right to be heard, but rather that they may have the due process of a fair trial. This could be provided without notice, under class action law. As is said by James E. Starrs, "The Consumer Class Action," 49 Boston University L.Rev. 407 at 504, the issue is whether the representative "rapidly got . . . in the case wearing his fighting trunks. . . ."[9]

The Los Angeles Superior Court class actions manual, Section 427.6, deals with the necessity for and content of notice. *Inter alia* it states ". . . notice to the class is not necessary in all actions, and an order may be made . . . dispensing with the requirements. . . ." Section

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[8]In the case of *Grossman v. Playboy Clubs International, Inc.*, No. 882,939 in the Superior Court of the State of California for the County of Los Angeles, notice was given by defendant to a national class after the case was settled before entry of judgment. There are cases where the trial court does not require notice. In *Northern Natural Gas Co. v. Grounds* (D. Kan. 1968), 292 F.Supp. 619, the court states, at 636:

> "In *Eisen v. Carlisle & Jacquelin*, the Second circuit states notice is required as a matter of due process in *all* representative actions. With deference, we believe the *Eisen* position is unsound and that the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by [the] named parties. Cf. also *Snyder v. Bd. of Trustees of U. of Ill.* (ND Ill. 1968) 286 F.Supp. 927, 12 F.R. Serv.2d 23 l. 3)."

[9]*Cf. Hansberry v. Lee*, 311 U.S. 32, 42, 43 (1940).

427.6(e)(i), (ii), and (iii) requires parties to file a statement as to the time notice should be given, the manner of giving notice, and which party or parties should bear the cost of notice. A copy of said 427.6 is attached as Appendix B hereto.

Conclusion.

Amicus does not intend to brief the many facets of this case. This is undoubtedly being done in-depth by the parties to this appeal.

Amicus believes, however, that the decision by the Court of Appeals below is inconsistent with the plain language of Rule 23 and with the law of class actions as it has evolved, and is contrary to trial court expertise being developed in California and elsewhere.

Amicus further believes that damage will be done to the orderly development of class action litigation in the several states, and particularly in California if the decision below, and Judge Medina's views, are allowed to stand.

Respectfully submitted,

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APPENDIX A.

Manual for Conduct of Pretrial Proceedings on Class Action Issues

INTRODUCTION

INFORMAL CONFERENCE ON CLASS ISSUES

PRETRIAL HEARINGS ON CLASS ISSUES

FOREWORD

This Manual for Conduct of Pretrial Hearings on Class Action Issues states the policy of the Los Angeles Superior Court concerning the procedure by which the Court will hear and determine prior to trial those disputed issues concerning the "class" aspects of the litigation.

This Manual represents the first attempt, so far as we know, to implement the observation of the California Supreme Court in Vasquez v. Superior Court (1971), 4 Cal.3d 800, at 820, that ". . . pragmatic procedural devices will be required to simplify the potentially complex (class) litigation while at the same time protecting the rights of all the parties." Certain procedures herein draw upon FRCP 23 and California Civil Code Section 1781 and the decision thereunder. However, the Manual also provides procedures not elsewhere used for the pretrial determination of class action issues. All the procedures herein, whether they follow earlier practice or are original, were adopted after considerable thought by both the Court and the Bar. This Manual is the product of three earlier drafts which were widely circulated among the judges of this Court and members of the metropolitan Los Angeles Bar; one public hearing also was held. A great number of comments were received concerning each prior draft and after the public hearing; all the comments were carefully considered and many of them constitute the foundation for particular sections of the Manual. The Court thanks those many members of the Bar who offered comments.

No attempt is made in the Manual to take a position on issues of law concerning class actions which are in

dispute. Thus, counsel should not feel precluded from arguing any relevant issue of law through concluding that the Court already has taken a position thereon.

Judge Robert A. Wenke, when he was supervisor of the Law and Discovery Department in 1972, perceived the need for this kind of manual when the several judges in that Department were hearing a variety of pretrial motions in class actions without having satisfactory guidelines to either counsel or the Court for the conduct of said hearing. One benefit from this Manual should be uniformity in the procedure by which class issues are heard and determined prior to trial.

Experience undoubtedly will demonstrate that the Manual should be modified in various ways. The Court intends to reexamine frequently the provisions set out herein and to make modifications as the need becomes apparent.

DAVID A. THOMAS
Judge of the Superior Court

APPENDIX B.

.6 Issue: Necessity for and Content of Notice.

Although as a general rule notice to the class of the pendency of the action shall be ordered, notice to the class is not necessary in all actions, and an order may be made, on motion of a party, dispensing with the requirement that the class be notified of the action. When a public entity or a public officer or public employee in his official capacity is an unnamed member of the plaintiff or defendant class, notice of the motion to dispense with the requirement that the class be notified of the action must be served on said public entity, public officer or employee in the same manner as a civil summons is served.

When one party submits a motion for an order concerning the giving of or dispensing with notice, each party will submit a statement on each of the following (E.g., said party will submit a statement of the proposed contents of the notice (Section 427.6(d) even though he seeks an order dispensing with notice):

(a) Documents, including declarations, if a party desires, of whether the action has great or little merit. (These documents will be considered only as they are relevant to the issues of whether notice should be given, at what time, and imposition of the expense of giving of notice.[5])

(b) A statement discussing whether notice should be given at all.

(c) A statement which assumes that notice will be given and discusses:

(i) The time when notice should be given.

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[5]This parenthetical clause does not apply to actions brought under the Consumers Legal Remedies Act. In said actions CC Sec. 1781(c)(3) will be followed by the court.

(ii) The manner in which notice will be given. This will include a discussion concerning whether said notice should be published, mailed or otherwise brought to the attention of class members. If recommended to be published, it will include the recommended publication media, including an estimate of the cost thereof. It recommended to be mailed, it will include a statement of the manner in which addresses of the class members will be obtained and an estimate of the cost of preparation of the notice and of said mailing. If notice is to be given through other means, a description of said other means will be set out in detail including an estimate of the cost. Each estimate of costs will contain a statement of the factual basis thereof. Each statement also will include an estimate, with the factual basis therefor, of the percentage of the class members which the party believes will receive knowledge of the pending action through use of each notice media.

(iii) The party who should bear the cost of giving the notice or the manner in which the cost thereof should be divided between the parties.

(d) A statement setting out the content of the proposed notice. Each proposed notice will include, at least, a representation concerning each of the following.

(i) Any member who so requests by a specified date may exclude himself from the class and the action by giving notice thereof ("opting out").

(ii) Information concerning how class members who desire to be excluded from the class ("opt out") may give notice thereof.

(iii) The claim of a member who does not request to be excluded from the class will be terminated by the judgment in the action under the rule of **res judicata.**

(iv) Any member who does not request exclusion may move the court for permission to appear as a named class co-representative.

(v) The estimated total amount of the recovery, the anticipated fee which will be sought by counsel for the class, the anticipated other expenses and costs to the class which will be paid from the funds recovered before distribution of the net proceeds to class members, and the net amount to be recovered by each member if the action is successful (a formula statement will be satisfactory).